**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**RSA No. 150 of 1995.**

**Reserved on: 3.8.2007.**

**Date of decision: 10.8.2007.**

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Wazir ... Appellant

Versus

The Executive Officer & Ors. … Respondents

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*Coram :*

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] No.

For the appellant : Mr. K.S. Thakur, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate, for respondents No. 1,3 and 4.

Mr. V.K. Verma, Additional Advocate General, for respondent No. 2.

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**V.K. Ahuja, J.:**

This is an appeal filed by the appellant against the judgment and decree of the Court of learned District Judge, Chamba, dated 3.12.1994, vide which the appeal filed by the appellant against the judgment and decree dated 27.8.1993 of the learned Senior Sub Judge, Chamba, Camp at Dalhousie, was dismissed.

Briefly stated the facts of the case are that the plaintiff had filed a suit for declaration as well as for mandatory injunction alleging that he was appointed as Safaiwala by defendants No. 1 and 3 in the year 1956. The plaintiff alleged that he was placed at second position

[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

in the seniority list issued by defendants No. 1 & 3 and he was entitled to promotion to the rank of Sanitary Supervisor. It was alleged that as per the orders dated 4.1.1991 issued from the office of defendant No. 1, the plaintiff has been superseded by defendant No. 4 who has been given promotion to the rank of Sanitary Supervisor. The plaintiff challenged the orders issued in this regard being against principle of natural justice, illegal, mala fide and void alleging that defendant No. 2 was much junior to the plaintiff and other persons. He made representations to defendants No. 1 & 3 and requested defendants No. 1 & 3 to give him promotion to the rank of Sanitary Supervisor to which he was legally entitled, but they refused. Hence, the present suit filed for declaration and mandatory injunction.

Defendants admitted that the plaintiff was at No. 2 in the seniority list, but not in seniority-cum-merit. They admitted that defendant No. 4 was promoted as Sanitary Supervisor, but on seniority-cum-merit basis. It was pleaded that the plaintiff was not found fit to perform the duties of Sanitary Supervisor, hence defendant No. 4 was promoted. The orders were in accordance with the rules. The representation made by the plaintiff was duly considered. Preliminary objections regarding maintainability of the suit and jurisdiction of the Court were also taken by the defendants.

Issues were framed by the learned trial Court. The suit was tried by the learned trial Court. It also made a reference to the rules vide which minimum educational qualification was prescribed, which was middle pass and since the plaintiff did not possess the necessary qualification, suit was dismissed.

On appeal, those findings were affirmed by the first appellate Court.

I have heard the learned counsel for the parties and have also gone through the record.

The only point urged by the learned counsel for the appellant during the course of the arguments was relying upon one document Ext. A-1 that the educational qualification laid down for the post of Sanitary Supervisor will not debar any person appointed prior to 1976 for promotion. Thus, it was submitted by the learned counsel for the appellant that since there was relaxation for the persons appointed prior to 1976, therefore, the plaintiff was liable to be considered and appointed to the post of Sanitary Supervisor. However, the learned counsel for the respondents had opposed this plea raised by the learned counsel for the appellant on the ground that this plea was never taken before the Courts below and was never considered by the Courts below which cannot be raised for the first time, which case was never made out from the pleadings of the case before the learned trial Court. I have carefully gone through the pleadings of the plaintiff and the plaintiff/appellant has nowhere claimed or alleged in the plaint that though he was not possessing the minimum qualification on merit basis, but in view of the instructions issued by the office of defendants No. 1 & 3 these were liable to be relaxed and, therefore, he was liable to be considered on the basis of the letter to the post of Sanitary Supervisor. The challenge was made by the plaintiff as per the allegations made in the plaint only on the ground that he was No. 2 in the seniority and the order passed appointing defendant No. 4 was malafide, illegal and void, since he was junior to the plaintiff and other employees. These pleadings were denied

by the defendants who pleaded that the appointment of defendant No. 4 was made on the basis of seniority-cum-merit and accordingly, defendant No. 4 was appointed. Once the plaintiff had not made out any case on the ground that he was not considered for the post and was to be considered in view of the relaxation, the defendants were not required to meet out this defence at this stage. However, this plea has been raised before this Court.

A perusal of the judgment of the learned trial Court shows that the trial Court had considered the question that the plaintiff was not a middle pass as required by the rules and the post was filled up on the basis of seniority-cum-merit and since the plaintiff was not found fit to the post of Sanitary Supervisor considering the suitability of the plaintiff that he was absolutely an illiterate, he was not appointed. It was also observed by the learned trial Court that the promotional post claimed by the plaintiff was a selection post and keeping in view the nature of the duties required to be performed by the Sanitary Supervisor which was reproduced by the Courts below in its judgment, it was held that the plaintiff was rightly ignored. Those findings were affirmed by the learned District Judge who also observed that for promotion to the post of Sanitary Supervisor the merit was also involved in the process of selection and a reference was made to the minimum educational qualification and experience required for this post. The learned District Judge has referred to this letter Ext. A-1 that there could no bar for promotion to the post of Sanitary Supervisor on the basis of the educational qualification laid down in the year 1976 and since the plaintiff admittedly was appointed before 1976, therefore, he could not be debarred from promotion on the basis of non-fulfillment of the

qualification as laid down in the year 1976. However, it was clearly laid down in the said letter itself that the promotion can be made on the basis of seniority-cum-merit and suitability of candidate was to be considered and accordingly the findings of the learned trial Court were affirmed.

It is clear from the above discussion that this plea was not specifically taken in the plaint and was not considered by the trial Court. Since the document was proved, this plea was raised by the appellant before the learned District Judge who had answered the plea in its right perspective. The post of Sanitary Supervisor being a selection post and keeping in view the nature of duties, the minimum qualification was must apart from the merit which was duly considered and therefore, no illegality can be found in the order passed by defendants No. 1 & 3 ignoring the claim of the plaintiff. The findings of both the Courts below dismissing the suit of the plaintiff are liable to be affirmed, which are affirmed accordingly. The appeal filed by the appellant is dismissed. However, parties are left to bear their own costs.

**CMP No. 214 of 1995:**

In view of the orders passed in the main appeal, this application also stands disposed of.

**( V.K. Ahuja ),**
**Judge**

**August, 10, 2007**
**(BSS)**